STANDARD CHARTERED BANK MALAYSIA BHD

v.

ARIVALAGAN KRISHNAN & ANOR

HIGH COURT MALAYA, SHAH ALAM
LOW HOP BING J
[ORIGINATING SUMMONS NO: MT4-24-811-1998]
20 JULY 2001

LAND LAW: *Charge - Order for sale - Cause to the contrary - Whether established - Power of attorney - Variation of interest - National Land Code 1965, s. 256*

CIVIL PROCEDURE: *Affidavits - Contents - Jurat - Address of deponent - Endorsement - Whether defective - Rules of the High Court 1980, O. 41 rr. 1(4), (8), 9(2)*

CIVIL PROCEDURE: *Affidavits - Affirmation - Affidavit-in-support affirmed before filing of originating summons - Whether admissible - Rules of the High Court 1980, O. 41 r. 1(1)*

CIVIL PROCEDURE: *Affidavits - Filing and service - Time - Whether there was delay - Rules of the High Court 1980, O. 32 r. 13(2)(b), O. 83 r. 2(4)*

The defendants were the registered proprietors of the land charged to the plaintiff as security in consideration of the plaintiff granting the 1st defendant a term loan of RM253,600. Subsequent to default in the repayment of the said loan the plaintiff made this application for an order for sale to enforce the charge under s. 256 of the National Land Code 1965 ('NLC'). The defendant raised the following preliminary objections: (i) the plaintiff's affidavit ('encl. 2') in support of its originating summons did not contain a jurat as per Form 78 as envisaged by O. 41 r. 1(8) Rules of the High Court 1980 ('RHC'); (ii) the deponent did not provide his residential address but instead gave his office address in contravention of O. 41 r. 1(4) RHC; (iii) the endorsement in encl. 2 was not in compliance with O. 41 r. 9(2); (iv) encl. 2 was affirmed well before the originating summons was filed; and (v) the plaintiff's additional affidavit was filed out of time in breach of O. 32 r. 13(2)(b).

The defendants further submitted that by virtue of a power of attorney registered to one Hor Sai Yow which was still subsisting at the time of the filing of the charge action, the action against the defendants was invalid and that the plaintiff had varied the chargeable interest without justification.

The plaintiff rejected all the preliminary objections and disputed vehemently the defendants' inclusion of annexures to the written submissions which were never a part of the defendants' affidavits. The plaintiff pressed for the order for sale and submitted that neither the execution of the power of attorney nor the interest variation constituted a cause to the contrary.

Held:

[1] The defendants' failed to specify which of the four forms in Form 78 had not been complied with. The generality and vagueness of their submissions were untenable and unsustainable. The jurat need not be preceded by a title, and being a statement, certificate or clause at the foot of the affidavit, constituted an integral part of the affidavit from which it was inseparable. The defendants' contention that the jurat contravened O. 41 r. 1(8) RHC had no merit.

[2] The plaintiff had *vide* the affidavit of one Lip Chun Mei ('encl. 14') provided the residential address of the deponent to which the defendants had the liberty of access.

[3] Order 41 r. 9(2) RHC is not specific as to where an endorsement should appear, and in the absence of such specification it will suffice if the endorsement appears in any conspicuous portion of the affidavit. In the instant case, the endorsement did appear in the jurat and at the bottom of the page. The requirements of O. 41 r. 9(2) RHC were thus satisfied and the affidavits were regular and valid.

[4] The RHC does not expressly or by implication require that a supporting affidavit should only be affirmed after the filing of the originating summons. In view of the filing and extraction procedure practised in the court registry, it will both be inconvenient and impractical for the affidavit to be affirmed on or after the date of the filing of the originating summons. The affidavits filed by the plaintiff herein were therefore both admissible and without defect.

[5] Order 32 RHC applies to applications and proceedings in chambers by way of summons in Form 62. The instant matter was a charge action which squarely fell within the ambit of O. 83 RHC. The plaintiff had filed and served the additional affidavit together with the notice of appointment of the adjourned hearing on the defendants more than two clear days before the hearing date as was required. There was therefore no question of delay on the service of the said affidavit.

[6] An application under s. 256 NLC is supposed to be speedy and summary in nature – so long as the appropriate statutory notices as stipulated in the NLC have been issued, the procedural requirements of O. 83 RHC have been complied with and the defence cannot establish "cause to the contrary" – an order for sale has to be dispensed. The defendants' grant of powers of attorney to Hor Sai Yow neither invalidated the charge action nor precluded the plaintiff's right to commence the same.

[7] The defendants' disputed the variation of interest through annexures appended to their written submissions which was improper, unethical and an affront to the proper conduct of the proceedings. Nevertheless, it was apparent that pursuant to cl. 6.04 of the facilities agreement signed between the defendants and the plaintiff, there was a provision for variation of interest from time to time and the plaintiff was at liberty to do so without notice to the defendants and this did not prejudice or invalidate any such variation.

[Order in terms of originating summons.]

Case(s) referred to:

Airmartech Corp (M) Sdn Bhd v. Equaltra (M) Sdn Bhd [2001] 2 CLJ 57 ***(foll)***
Arab-Malaysian Finance Bhd v. Serajudin Mohd Ismail & Anor [1999] 6 CLJ 405 ***(not foll)***
Ban Hin Lee Bank Bhd v. Pang Lai Hin [1999] 7 CLJ 385 ***(not foll)***
Citibank NA v. Ooi Boon Leong & Ors [1981] 1 MLJ 282 ***(refd)***
Datin Melati Abdullah & Ors v. Syed Hassan Syed Salim [1999] 5 CLJ 582 ***(refd)***
Foo Yoke Foon v. Public Bank Bhd [2000] 3 CLJ 405 ***(refd)***
Han Euu Tiam v. Phang Kui Fatt & Ors [1999] 4 CLJ 395 ***(not foll)***
Hock Thai Finance Corporation Bhd v. Tai Choi Yu [2000] 5 CLJ 314 ***(refd)***
Hong Kong Bank Malaysia Bhd v. Nor Harizan Mohd Ali [1999] 6 CLJ 466 ***(foll)***
Kemayan Construction Sdn Bhd lwn. TC Development Sdn Bhd [2000] 7 CLJ 41 ***(foll)***
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 ***(foll)***
Majlis Daerah Dungun v. Tenaga Nasional Bhd [1999] 8 CLJ 337 ***(refd)***
Mohd Nazir Badar Shair v. Timbalan Menteri Dalam Negeri & Ors [2000] 2 CLJ 805 ***(foll)***
Yang Lak Man v. Yang Paw Man [1999] 7 CLJ 131 ***(foll)***
Yogananthy As Thambaiya v. Idris Osman [1997] 5 CLJ 705 ***(refd)***

Legislation referred to:

National Land Code, s. 256(3)
Rules of the High Court 1980, O. 32 r. 13(2)(b), O. 41 rr. 1(1), (4), (7), (8), 9(2), O. 83 r. 2(4)

For the plaintiff - Suhanya Krishnan; M/s Paul Chong & Kraal
For the defendant - G Ganesan; M/s GS Mani, Ganesh & Wong

Reported by K Ganesh

JUDGMENT

Low Hop Bing J:

Application

This is an application by the plaintiff for an order for sale to enforce a charge under s. 256 of the National Land Code. The facts of the case are simple and straightforward. The first defendant has obtained from the plaintiff a term loan of RM253,600. Both the defendants were the registered proprietors of the land which was duly charged to the plaintiff by way of security for the said term loan. The charge was accordingly registered in the relevant land office. Consequent upon repeated defaults in the repayment of the said term loan, the plaintiff commenced the instant charge action against the defendants. For the purposes of this judgment a reference to an Order and a rule is a reference to that order and rule in the Rules of the High Court 1980.

Submission For The Defendants

Encik G. Ganesan, learned counsel for the defendants, raised several preliminary objections to the charge action before dwelling upon the merits of the case.

His preliminary objections were based on the following grounds:

1. The plaintiff's affidavit in encl. (2) in support of the originating summons in encl. (1) "does not contain jurat as required according to O. 41 r. 1(8) ie, Form 78";

2. The deponent did not give his place of residence but the address of his place of work in encl. (2) contrary to O. 41 r. 1(4);

3. The endorsement in encl. (2) does not comply with O. 41 r. 9(2);

4. Enclosure (2) was affirmed before the originating summons in encl. (1) was filed; and

5. The plaintiff's affidavit tambahan 4 was filed after the time required and so has breached O. 32 r. 13(2)(b).

On the merits of the plaintiff's charge action, defendants' learned counsel argued that both the defendants have given powers of attorney registered under No. 21792/97 and 21793/97 at the Kuala Lumpur High Court to one Hor Sai Yow on 25 March 1997 pursuant to a sale and purchase agreement of the same date, wherein Hor Sai Yow as donee is to defend the defendants in all legal proceedings. These powers of attorney were still subsisting on the date of filing this charge action ie, on 10 August 1998. This charge action against the defendants is, in his view, not valid.

The next point which defendants' learned counsel canvassed was that the plaintiff has varied the interest without basis in that the interest charged for the loan by the plaintiff differs from what was mentioned in the letter of offer and that the interest rate mentioned in the letter of demand, Form 16D and that in the originating summons in encl. (1) also differ.

Plaintiff's Response

In respect of the various issues raised by the defendants' learned counsel by way of preliminary objections Cik Suhanya Krishnan, learned counsel for the plaintiff, responded as follows:

1. Plaintiff's supporting affidavit in encl. (2) does not contravene O. 41 r. 1(8) and Form 78;
2. The deponent's place of residence in encl. (2) has been included in the plaintiff's further affidavit 4 (affidavit tambahan 4) affirmed by one Lip Chun Mei on 6 October 2000;
3. There was proper indorsement in the plaintiff's affidavit in encl. (2);
4. Plaintiff's affidavit in encl. (2) is regular and admissible; and
5. There is no delay on the part of the plaintiff in filing and serving the plaintiff's further affidavit 4 (afidavit tambahan 4), as O. 32 r. 13(2)(b) which applies to summons in Form 62, does not apply to a charge action here.

On the merits of this originating summons, the plaintiff's learned counsel vigorously objected to the inclusion of annexures to the defendants' written submission but which were not in the defendants' affidavits. It was further submitted that neither the execution of the powers of attorney nor the variation of interest could constitute a cause to the contrary. The plaintiff therefore prays for an order for sale.

Decision Of The Court

Preliminary Objections

Although defendants' learned counsel submitted at great length on the requirement of a jurat pursuant to O. 41 r. 1(8) and Form 78, his 15 page submission on this issue alone did not make it clear as to which of the four specific forms in Form 78 has not been complied with.

Paragraph 6(b) of the defendants' affidavit in encl. 5 alleged that the plaintiff's application was defective because:

(b) Afidavit Sokongan Plaintif bertarikh 4.8.1999 dan Afidavit Tambahan Ketiga bertarikh 14.2.2000 tidak menepati Aturan 41 Kaedah 1(7) memandangkan tidak ada Jurat yang menepati Borang 78 Kaedah-Kaedah Mahkamah Tinggi, 1980.

(Translation: Plaintiff's affidavit in support dated 4 August 1999 and Third Supplmentary Affidavit dated 14 February 2000 do not comply with O. 41 r. 1(7) as they do not have a Jurat which complies with Form 78 of the Rules of the High Court 1980.)

The submission and affidavit filed for the defendants on the issue is far too general or cloudy to fathom or comprehend which specific form in Form 78 he was harbouring on. In my view, the generality or cloudiness of this submission renders the submission untenable and unsustainable. However, be that as it may, the relevant provisions governing this situation are to be found in O. 41 r. 1(7) and (8), which are reproduced as follows:

(7) Every affidavit must be signed by the deponent and the jurat must be completed and signed by the person before whom it is sworn.

(8) A jurat must be in one of the forms in Form 78.

Before I proceed to consider the legal effect and implication of O. 41 rr. 1(7) and (8), it is necessary to grasp the meaning of the word 'jurat'. Our relevant laws such as the Rules of the High Court 1980, the Courts of Judicature Act 1964 and the Interpretation Acts 1948 and 1967 do not provide for a definition for this word. However, *Jowitt's Dictionary of English Law* (1977 edn) defines it as:

the statement **at the foot of an affidavit** of the names of the parties swearing it, and of the officer before whom it is sworn, of the date, and of any other necessary particulars, as the affidavit of an illiterate or blind person as read in the presence of an officer to such person and that he seemed perfectly to understand it (RSC, Order 41 rr 1, 3). (emphasis added.)

In *Malaysian Court Practice* (Malayan Law Journal Sdn Bhd 1997), High Court, 1, at p. 2515, the meaning of "jurat" is explained as follows:

(41.1.13) Jurat

A Jurat means a certificate of the administering officer or a person before whom the affidavit was sworn. It refers to the clause written **at the foot of the affidavit,** stating when, where, and before whom such affidavit was sworn. A jurat must be in one of the forms in Form 78. Every affidavit must be signed by the deponent and the jurat must be completed and signed by the person before whom it is sworn. (emphasis added)

(see also *Han Euu Tiam v. Phang Kui Fatt & 2 Ors* [1999] 4 CLJ 395, per Mohd. Hishamudin bin Mohd Yunus, J). The impugned affidavits are encls. (2) and (14) herein. The respective jurats are reproduced as follows:

> DISUMPAH OLEH GILBERT GOMEZ A/L PATHROSE GOMEZ pada 4 AUG 1998 pada 1.00 petang di KUALA LUMPUR.

(Translation: Sworn by Gilbert Gomez a/l Pathrose Gomez on 4 August 1998 at 1pm in Kuala Lumpur.)

> DIANGKAT SUMPAH oleh LIP CHUN MEI pada 14.02.2000 pada 4.00 petang di Kuala Lumpur.

(Translation: Sworn by Lip Chun Mei on 14 February 2000 at 4pm in Kuala Lumpur.)

In *Han Euu Tiam v. Phang Kui Fatt & 2 Ors, supra*, the jurat did not reproduce the title as in the action. It was held by Mohd Hishamudin bin Mohd Yunus, J that "it is clear from Form 78, by the presence of the words:

> (Title as in action)

appearing at the top part of the Form, that the title of the action must be stated at the top part of the certificate." His Lordship summed up as follows:

> To sum up, it is my finding that there has been a departure from the prescribed format and that such departure is not trivial in nature. There has been a substantial deviation. In view of this substantial deviation and bearing in mind that Order 41 r. 1(7) and (8) use the word "must", I am unable to accept the jurat, as used by the plaintiff, as a valid jurat. To my mind, the extent of the defect is serious; it is as good as not having a jurat. In my judgment, strict compliance with the prescribed format is mandatory.

This part of the judgment in *Han Euu Tiam v. Phang Kui Fatt & 2 Ors, supra*, pertaining to the reproduction of the title on the top part of the jurat, was with due respect not followed in *Mohd Nazir bin Badar Shair v. Timbalan Menteri Dalam Negeri & 2 Ors* [2000] 2 CLJ 805; *Kemayan Construction Sdn Bhd lwn. TC Development Sdn Bhd* [2000] 7 CLJ 41 and *Airmartech Corp (M) Sdn Bhd v. Equaltra (M) Sdn Bhd* [2001] 2 CLJ 57. In *Mohd Nazir bin Badar Shair v. Timbalan Menteri Dalam Negeri & 2 Ors, supra* the title of the action was not included in the jurats to the affidavits filed therein. On this issue, Augustine Paul, J held as follows:

> The presence of the words "O. 41 r. 1" in the heading of Form 78 of the RHC which read 'FORMS OF JURAT (O 41 R 1)" means that the form provided have in contemplation the whole of Order 41 r. 1 of the RHC. Thus Order 41 r 1 must be read as a whole in order to determine whether the words

> "(Title as in action)" appearing at the top of Form 78 of the RHC refer to the jurat or the affidavit itself. Reading Form 78 together with Order 41 r 1(1), the words "(Title as in action)" relate to the affidavit and not the jurat, and what must carry the title of the action is the affidavit and not the jurat. Thus there is no requirement that a jurat need be entitled. Therefore, in the present case, the absence of the title of the action in the affidavits objected to did not render it defective or irregular.

A similar situation arose in *Kemayan Construction Sdn Bhd lwn. TC Development Sdn Bhd, supra,* where Abdul Hamid Said, JC (now J) overruled the objection based on the absence of the title in a jurat and said:

> Order 2 r. 1(1) of the RHC empowers the court to correct irregularities arising from non-compliance with the RHC in the absence of prejudice. In the present case, the plaintiff's error was in not stating the title of the action in the jurat. As the jurat was not a document separate from the affirmed affidavit, the absence of the title of the action in the jurat did not cause any prejudice or injustice to any of the parties. The absence of the title of the action also did not affect the merit and the court's jurisdiction. Therefore, the defendant's objection ought to be dismissed.

K.N. Segara, J held the same view in *Airmartech Corp (M) Sdn Bhd v. Equaltra (M) Sdn Bhd, supra,* in the following words:

> Failure of the jurat to bear the title was of very little significance or consequence as the jurat is not a separate document from the affidavit sworn – the jurat forms part of the affidavit and the affidavit is already intituled. In any event, s. 71 of the Interpretation Acts 1948 and 1967 provides that whenever forms are prescribed, slight deviations thereform not affecting the substance or calculated to mislead shall not invalidate them, save as is otherwise provided for. The RHC did not expressly invalidate non-compliance with its Forms and in particular Form 78 (forms of jurat).

As amply demonstrated above, there is a plethora of authorities to support the view that a jurat does not have to be preceded by a title to an action. Besides agreeing with the views expressed in the latter three cases, that a jurat does not have to be preceded by a title to an action, I would add that the jurat, being a statement, certificate or clause "at the foot of an affidavit" as contained in the meaning of the word "jurat", is certainly an integral and component part of an affidavit, forming one and the same document or process as the affidavit. A jurat is logically a constituent part and parcel of the affidavit from which it is inalienable. As a jurat is part of the same document as an affidavit, being at the foot of that affidavit, I am of the view that the inclusion of a title to an action in the jurat is otiose and so the non-inclusion thereof does not contravene O. 41 r. 1(7), (8) and Form 78. With due respect, therefore, I am unable to follow *Han Euu Tiam v. Phang Kui Fatt & 2 Ors, supra,* in so far as the inclusion of the title to an action is concerned.

On the issue of interpretation, I am of the view that where no interpretation is required, as in the case of the two aforesaid deponents, the words "Through the interpretation of ..." may simply be dropped, as has been done in the instant case by using Form 78(a). (See also *Han Euu Tiam v. Phang Kui Fatt & 2 Ors.* [1999] 4 CLJ 395).

The next issue relates to the plaintiff's failure to use the deponent's place of residence in the affidavit in encl. (2). It is true to say O. 41 r. 1(4) provides, *inter alia*, that every affidavit must state the place of residence of the deponent. (See also Chief Registrar's Circular No. 2/99). However, it is to be observed that the plaintiff has through the affidavit of one Lip Chun Mei in encl. (14) stated the residential address of the deponent and the plaintiff is hence at liberty to avail itself of the contents of encl. (14).

The indorsement in the plaintiff's affidavit in encl. (2) is the third issue raised. Order 41 r. 9(2) reads as follows:

> (2) Every affidavit must be indorsed with a note on whose behalf it is filed and the dates of swearing and filing, and an affidavit which is not so indorsed may not be filed or used without the leave of the Court.

It is noteworthy that O. 41 r. 9(2) has not specifically stated in which part of an affidavit the indorsement should appear. In the absence of such a specification, I am of the view that the indorsement may appear in any conspicuous part of the affidavit. In encl. (2), the indorsement on whose behalf the affidavit is filed and the date of swearing do appear in the jurat and also in the last paragraph at the bottom of the page. Further, the plaintiff's afidavit tambahan 4 by one Lip Chun Mei affirmed on 6 October 2000 has incorporated the indorsement at the top right hand corner on the first page of the affidavit. I hold that these indorsements have fulfilled the requirements of O. 41 r. 9(2) and are therefore regular and in good order.

The defendants' contention, that the plaintiff's affidavit in support (encl. (2)) is inadmissible as it was affirmed on 4 August 1998 before the originating summons in encl. (2) was filed on 10 August 1998, is apparantly based on the decisions of RK Nathan, J in *Ban Hin Lee Bank Bhd v. Pang Lai Hin* [1999] 7 CLJ 385 and *Arab-Malaysian Finance Berhad v. Serajudin Mohd Ismail & Anor* [1999] 6 CLJ 405. In these two cases, His Lordship held, *inter alia*, that the respective affidavit in support of the plaintiff's originating summons was not admissible as it was affirmed before the filing of the said originating summons. The grounds given by His Lordship are as follows:

With respect, I am of the view that specific attention ought to be given to Order 41 r. 1 of the RHC which reads:

(1) Subject to paragraphs (2) and (3), every affidavit sworn in a cause or matter must be entitled in that cause or matter.

(2) Where a cause or matter is entitled in more than one matter, it shall be sufficient to state the first matter followed by the words 'and other matters', and where a cause or matter is entitled in a matter or matters and between parties, that part of the title which consists of the matter or matters may be omitted.

(3) ...

In other words an affidavit affirmed in a cause or matter must be intituled in that cause or matter. For a cause or matter to be properly entitled or intituled, the case number relating to that cause or matter is a vital factor that must be present; and before a case number is given to that particular cause or matter it must comply with Order 1 r. 4 of the RHC which defines a "cause book" as a book kept in the Registry in which the number of, and other details relating to, a cause or matter are entered. Therefore where as in this case an affidavit has been affirmed exactly one week before the OS was filed, surely the said affidavit cannot be said to have been affirmed in a cause or matter because properly speaking there was no cause or matter that had been registered at the Registry. Whilst I agree that in so far as interlocutory or *ex parte* applications are concerned, the courts have accepted the affidavit affirmed prior to the filing of the application on the express undertaking of counsel to reswear the said affidavit, but in the present case where the affidavit forms the evidence on which the application is to be launched, and if the affidavit has not been affirmed in an existing cause or matter, then the filing of such an affidavit cannot be treated as an irregularity that can be cured. In my view it is a nullity as it supports a non-existent cause or matter. In other words, the affidavit is 'still-born' and no resuscitative procedure by way of Order 2 r 1 of the RHC which relates to the liberal stand taken by the courts in respect of non-compliance of the rules, can breathe life into the 'still-born'. It remains a nullity. In the circumstances, even Order 41 r. 4 of the RHC which read:

> An affidavit may, with the leave of the court, be filed or used in evidence notwithstanding any irregularity in the form thereof.

cannot save the day for the plaintiff.

With due respect to my learned brother, His Lordship's judgments were not followed in *Hong Kong Bank Malaysia Bhd v. Nor Harizan binti Mohd Ali* [1999] 6 CLJ 466 and *Yang Lak Man v. Yang Paw Man* [1999] 7 CLJ 131.

In *Hong Kong Bank Malaysia Bhd v. Nor Harizan binti Mohd Ali, supra,* the originating summons was filed on 25 September 1996 together with a supporting affidavit which was sworn on 17 September 1996. Azhar bin Hj. Ma'ah, J held that the said affidavit was admissible. His Lordship also referred to O. 41 r. 1 and gave his grounds, *inter alia,* as follows:

> Order 41 r. 1 of the Rules of the High Court 1980 required that an affidavit to be used in support of an originating summons must be given a title. The title should relate to the subject matter of the action, and in the present case, this was present. The case number that is assigned by the court registry upon filing an originating summons is for administrative purposes only and could not be considered as the title in the cause or matter.
>
> The swearing of an affidavit that bears no registration number of the case before the originating process had even begun does not violate any provision of the law, and to hold otherwise would result in grave hardship and unnecessary inconvenience to the parties concerned.
>
> Therefore, in the present case, to hold that the affidavit was defective on the ground that it lacked the registration number and therefore not properly entitled would militate against basic principle of justice. The affidavit therefore was properly admitted and admissible.

In *Yang Lak Man v. Yang Paw Man, supra,* the plaintiff filed an originating summons on 1 March 1999 which was supported by an affidavit affirmed on 8 February 1999. The issue was whether the affidavit is defective because it was affirmed before the originating summons was filed. Mohd Hishamudin bin Mohd Yunus, J after referring to the aforesaid two judgments of RK Nathan, J and the decision of Azhar bin Hj. Ma'ah, J, shared the view of Azhar bin Hj. Ma'ah, J and said as follows:

> With respect, I share the view as expressed by the learned judge in *Hongkong Bank.* On my part, I have nothing more to add to what has been expressed by Azhar J except just to stress that, having scrutinised O. 41 r. 1(1) and (2), I simply fail to see in what way it could justifiably be said that the said provisions, either expressly or by implication, require the affirming of a supporting affidavit to be done only **after** the originating summons has been filed and not before. It is, I concede, true that an affidavit affirmed **before** the originating summons is filed would not carry the originating summons serial number **as yet**. But then this omission, at the time of the affirmation, is understandable, and should not, in my mind, be a matter of grave concern. For the serial number would in due course (when the originating summons together with the supporting affidavit are filed in court), partly as a matter of procedural law (O. 6 r. 6(3) read together with O. 7 r. 5 of the RHC), and partly as a matter of hitherto accepted practice, be given by the registrar and thereafter inserted by the relevant officer of the court in the title (as a matter of practice, at the time of filing, the reference to the serial number in the title would be left blank in the form 'Originating Summons No: ...') of both the originating summons as well as the supporting affidavit.

Another thing that I wish to add is that, in my humble view, it is unfair to overemphasise the importance of the serial number of a supporting affidavit in respect of a **nascent** (that is, a pre-presented) originating summons. The serial number, as we are all aware, is only one of the components or parts of the title of the action. There are other equally important components of the title, that is, the name of the High Court where the action is filed, the name of the parties to the action, and the subject matter of the action (expressed in the form of '(In the matter of ...)'), as illustrated by Azhar J (at p 633A-E) in *Hongkong Bank.*

Finally, I share the sentiment as expressed by the learned judge in *Hongkong Bank* that, to insist that a supporting affidavit for an originating summons be affirmed only **after** the originating summons has been filed in court, would be not only contrary to established contemporary legal practice but would also cause unnecessary confusion and hardship to litigants.

Accordingly, the preliminary objection is overruled.

Having the advantage of reading the well-researched judgments of my three learned brothers above, with due respect, I am inclined to the views of only two of them, *viz.* Azhar, J and Mohd Hishamudin, J and I associate myself with all the grounds profferred by their Lordships Azhar, J and Mohd Hishamudin, J in their respective judgments.

Having the benefit of hindsight, I would stress that O. 41 r. 1(1), which has become the focus of judicial interpretations in all aforesaid four judgments, did not make any reference to any serial number of a cause or matter but merely that "every affidavit sworn in a cause or matter must be entitled in that cause or matter". That being the case, the case number or serial number, as the case may be, is not a specific or express requirement of O. 41 r. 1(1). By way of a practical illustration, when an originating summons is to be filed in court, the originating summons and the affidavit in support thereof are invariably prepared together and the affidavit in support is normally affirmed first and then filed, as a matter of practical convenience, together with the originating summons. The originating summons would then be registered with a case number with the necessary code for the purposes of the payment of praecipe. Thereafter, possibly a few days or exceptionally few weeks later, depending on the volume and pressure of work at the registry of the court the originating summons would be sealed and finally it is signed by the registrar of the court, to be extracted by the law firm filing it. It would be inconvenient or impractical for the affidavit to be affirmed on or after the date on which originating summons has been filed and extracted, as it would mean filing the originating summons first, obtain the extract copy with the case number and then file the affidavit in support. That possibly is the reason why

O. 41 r. 1(1) does not make any reference to the case number or serial number but merely the title. In the circumstances, I hold that the affidavits filed by the plaintiff herein are not defective and therefore admissible.

The last issue raised in the defendants' preliminary objections is that the plaintiff's affidavit tambahan 4 was filed after the prescribed time and has therefore breached O. 32 r. 13(2)(b). In order to appreciate the legal effect and implication of O. 32 r. 13(2)(b), it is necessary to reproduce the relevant provisions as follows:

> (a) ...;
>
> (b) a party wishing to reply an affidavit served on him must file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him.

Order 32 comes under the heading "Applications And Proceedings In Chambers" which means that it applies to applications and proceedings in chambers by way of summons in Form 62: (see also *Majlis Daerah Dungun v. Tenaga Nasional Berhad* [1999] 8 CLJ 337). The originating summons before me is a charge action governed by O. 83. The relevant facts demonstrate that on 29 June 2000, the hearing of this charge action was adjourned to 7 November 2000. The plaintiff's solicitors have served the plaintiff's affidavit tambahan 4 on the defendants' solicitors on 2 November 2000. Order 83 r. 2(4) provides that where a hearing is adjourned, then, subject to any directions given by the court, the plaintiff must serve the notice of appointment for the adjourned hearing together with a copy of any further affidavit intended to be used at that hearing, on the defendants not less than two clear days before the day fixed for the hearing. In the instant case, the affidavit tambahan 4 sworn by one Lip Chun Mei on 6 October 2000 was served together with the notice of appointment on the defendants' solicitors on 2 November 2000 at 3.45pm which was well within the requirement of two clear days prescribed in O. 83 r. 2(4). There is therefore in my view no delay on the service of the said affidavit.

In deference to the industrious efforts expended by defendants' learned counsel in relation to the authorities cited by him pursuant to O. 32 r. 13(2)(b), I would refer to them individually. *Hock Thai Finance Corporation Berhad v. Tai Choi Yu* [2000] 5 CLJ 314 concerned the interpretation of O. 32 r. 13(2)(b) in relation to an application by way of summons in chambers for stay of execution.

In *Datin Melati Abdullah & Ors v. Syed Hassan Syed Salim* [1999] 5 CLJ 582, the application was to extend time to file affidavit in reply under O. 32 r. 13(2)(b) and is yet another application by way of summons in chambers.

Yogananthy As Thambaiyaa v. Idris Osman [1997] 5 CLJ 705 is of the same species, ie, an application by way of summons in chambers for an interim injunction.

The aforesid three authorities relied on by the defendants are, on the foregoing grounds, obviously unable to lend any assistance to the defendants.

I therefore hold that all the issues raised in the preliminary objections by learned counsel for the defendants are not legally sustainable and are hereby overruled.

Merits Of The Charge Action

The charge action was commenced by the plaintiff under s. 256 of the National Land Code. Section 256(3) thereof provides that on any such application, the court shall order the sale of the land to which the charge relates, unless it is satisfied of the existence of "cause to the contrary". The proper judicial approach as to what constitutes "cause to the contrary" has been succinctly stated by the Court of Appeal in *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36 at pp. 44, 45 and 46 as follows:

> 'Cause to the contrary' within s. 256(3) of the Code might be established only in three categories of cases: (i) when a chargor was able to bring his case within any of the exceptions to the indefeasibility doctrine in s. 340 of the Code; (ii) when a chargor could demonstrate that the chargee had failed to meet the conditions precedent for the making of an application for an order for sale; and (iii) when a chargor could demonstrate that the grant of an order for sale would be contrary to some rule of law or equity. If no cause to the contrary could be shown, the court would be obliged to make an order for sale; *Murugappa Chettiar v. Letchumanan Cettiar* [1939] MLJ 296 and *Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457.

The Court of Appeal in the same case also set out at p. 51D the duty of a judge in hearing such a charge action, in the following words:

> A judge hearing an application under s. 256 of the Code must bear in mind that the procedure under the section is meant to be speedy and summary in nature. He is first concerned with whether the chargee has given the appropriate statutory notices as stipulated in the Code. Next, he must ensure that the procedural requirements prescribed by O. 83 of the Rules of the High Court 1980 have been complied with. Next, he is concerned with the very narrow question whether the material produced before him by the chargor constitutes cause to the contrary.

The defendants' arrangement to give powers of attorney to one Hor Sai Yow cannot by any stretch of imagination preclude the plaintiff's right to commence a charge action against registered proprietors ie, the defendants under the said s. 256. These powers of attorney do not invalidate the charge action herein. If the grant of a power of attorney by a chargor to a third party can produce the result of defeating a chargee's right to commence a charge action, or invalidating the charge action, the chargor would then appear to have the best of both worlds, *viz*, on the one hand, after defeating the chargee's right to commence a charge action, or invalidating it, the chargor is in a position to avoid the repayment or servicing of the financial facilities secured under the charge; on the other hand, the chargor is also further enriched by his obtaining a sum of money in the form of payment of the purchase price which constitutes the valuable consideration flowing from the donee to whom the irrevocable powers of attorney have been granted, such as in the case here, in which one Hor Sai Yow was granted the powers of attorney, for valuable consideration and expressed to be irrevocable. Surely this cannot be the correct legal position in the financial world. If that were to be the position, the inevitable result would have been the collapse of countless if not all financial institutions.

Since the donee Hor Sai Yow has been granted the power, *inter alia*, "to defend all legal proceedings" brought against the donors ie, the defendants, the said Hor Sai Yow can surely take the liberty and is indeed reasonably expected to substitute his name as the defendant for the defendants in the instant case, or to apply for leave to intervene. However, nothing has been done by the said Hor Sai Yow. To say the least, this contention by the defendants' learned counsel is full of flaws, absolutely without any merit and stands neither to reason nor law and certainly does not come within the ambit of "cause to the contrary" as adumbrated above.

The question of variation of interest raised for the defendants was apparently supported by two photocopied documents *viz.* annexures 5 and 6 purportedly appended to the written submission of the defendant's learned counsel but do not form part of a duly affirmed affidavit. This conduct of the defendants' learned counsel certainly is not the proper, ethical or legal mode of dealing with proceedings in a charge action and there is no obligation nor any plausible reason on the part of the court to consider these so-called annexures.

Be that as it may, for purposes of completeness, I would still anxiously consider these annexures for whatever they are worth.

The contention by learned counsel for the defendants is that the variation of interest by the plaintiff is without basis. It is to be noted that the plaintiff's facilities agreement exhibited as "LCM3" in the affidavit tambahan 4 of Lip Chun Mei, p. 30 reads:

Section 6.04 VARIATION OF INTEREST RATE

(1) Notwithstanding the provisions relating to the rate of interest as herein provided, or the Prescribed Rate or the Default Rate the Borrower agrees that the Bank is entitled at any time and from time to time to vary the rate of interest as herein provided, or the Prescribed Rate or the Default Rate or any commission discount or other banking charges. Notwithstanding the generality of the foregoing, the variation may be in respect of the Base Lending Rate of the Bank, or the spread or quantum of the interest that is payable over and above the Bank's Base Lending Rate, or the percentage of interest itself in cases where the rate of interest is not calculated on the Bank's Base Lending Rate, or a combination of any one or more of the methods or the manner of computation of interest aforesaid including but not limited to varying or changing the basis upon which the rate of interest as herein provided, or the Prescribed Rate or the Default Rate is arrived at.

(2) Where variation in the matter aforesid occurs, the amended or new rate of interest or commission, discount or banking charges shall be payable from the date such amended or new rate of interest is imposed or takes effect and interest be recomputed, if necessary, in accordance with the provisions of this Agreement.

(3) The Bank may give notice of change of the rate of interest, or the Prescribed Rate, to the Borrower but failure by the Bank to give notice shall not prejudice or have the effect of invalidating any such variation. Notice by the Bank may be effected in accordance to section 15.29 or at the Bank's discretion by general advertisement in any one or more of the form(s) of mass communication or by notice placed at the banking hall at the Bank's place of business stipulated in Section 2 of the First Schedule hereto.

As such, it is crystal clear that the plaintiff in accordance with this clause is allowed to vary its rate of interest at any time and from time to time. The bank, also in accordance with cl. 6.04(3), does not have to give notice of change of rate of interest, and failure to do so shall not prejudice or have the effect of invalidating any variation. My view is fortified by the judgment of the Court of Appeal in *Foo Yoke Foon v. Public Bank Bhd* [2000] 3 CLJ 405. In that case, the charge documents stipulated interest at 18% per annum. They also provided for variation of interest at the instance of the respondent as well as penalty interest to be imposed. The documents were executed by the

appellant in the presence of his own solicitors. Hence, the Court of Appeal held that "the appellant could not be heard to say that the variation of interest by the respondent was a unilateral act. Written notice to vary interest or to impose penalty interest is not a must." A similar situation prevails in the instant case.

Further cl. 9.19 of the charge exhibited as "LCM 4" in affidavit tambahan 4 of Lip Chun Mei affirmed on 6 October 2000 states that "it is hereby agreed that any admission or acknowledgement in writing by the borrower, or the chargor, or by any person authorised on their behalves or a judgment (by default or otherwise obtained against any of them) or a statement of account in writing showing the indebtness of the borrower, or the chargor, which is duly certified by an authorised officer of the bank shall be binding and conclusive evidence against the chargor for whatever purpose including as being conclusive of indebtedness in a court of law." This means that for the purpose of fixing the defendants' liability, the defendants' indebtedness may be ascertained conclusively by the plaintiff's certificate: *Citibank NA v. Ooi Boon Leong & Ors* [1981] 1 MLJ 282 FC.

In conclusion, I hold that the issues raised for the defendants do not constitute any cause to the contrary as understood in s. 256. I therefore make an order in terms of the plaintiff's originating summons in encl. (1).